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No. 03-1417

Supreme Court, U.S.
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In the Supreme Court of the United States

CHRIS FRAGOZO, and MARIA SANCHEZ
Cross-Petitioners,

v.

ALFRED CASTELLANO,
Cross-Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITIONERS' CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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REASONS FOR DENYING THE CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI:

Review should be denied because the Court of Appeals correctly remanded all claims. Castellano was not required to cross-appeal because he was not seeking to expand his rights under the judgment or alter it. (Pet. App 42-43a). Whether a cross-appeal was jurisdictional or a rule of practice has not been shown to be an issue here because Castellano fell within the exception articulated in *United States v. American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924). Finally, remand was appropriate here under the unique circumstances of this case because the Court of Appeals "changed the rules of the game." (Pet.App. 46a).

1. Review should be denied because the Court of Appeals did not exceed its jurisdiction or depart from the accepted and usual course of judicial proceedings by remanding on all claims where it did not *sua sponte* create any new constitutional claims and Castellano was not required to cross-appeal.

The Court of Appeals possessed jurisdiction to remand all claims.[1] The Court of Appeals did not create any new causes of action. As far as the Fourteenth Amendment claim, the Court of Appeals acknowledged that the Cross-Petitioner's "manufacturing of evidence and knowing use of that evidence along with perjured testimony to obtain a wrongful conviction

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[1] The Court of Appeals split 12-3 to remand on the Fourteenth Amendment claim. The Court split 9-6 to remand the Fourth Amendment claims. The Court split 8-7 to remand on the state law claim.

deprives a defendant of his *long recognized* right to a fair trial secured by the Due Process Clause." (Pet.App.3a) [emphasis added].

The Court of Appeals remanded the Fourteenth Amendment claim after concluding that on appeal Castellano sufficiently urged affirmation of the judgment on the basis that the jury effectively decided the Fourteenth Amendment claim because the jury was charged on due process despite the earlier dismissal by the trial court. (Pet.App. 3a, 8a and 41-43a). In short, Castellano was not seeking to expand his rights or alter the judgment but rather affirm it, and thus, no cross appeal is required. *American Railway Express Co.*, 265 U.S. 425, 435, 44 S.Ct. 560, 68 L.Ed. 1087 (1924). As stated by the Court of Appeals:

> "[I]t is settled that an appellee may urge any ground available in support of a judgment even if that ground was earlier and erroneously rejected by the trial court.

(Pet.App. 43a). *See, United States v. Hill*, 42 F.3d 914, 917, n.8 (5th Cir. 1995); *Hoyt R. Matise Co. v. Zurn*, 754 F.3d 560, 565 n. 5 (5th Cir. 1985); *City of Safety Harbor v. Birchfield*, 529 F.2d 1251, 1254 n. 4 (5th Cir. 1976).

As for the Fourth Amendment claim, the Court of Appeals, albeit erroneously, reversed the judgment because it concluded that it "must return to the basics" and insisted that Castellano's Fourth Amendment claim for wrongful conviction rest upon a denial of rights secured by the Fourth Amendment, which are not coextensive with the common-law elements of malicious prosecution. (Pet.App. 2-3a and 44a). The Court of Appeals remanded the Fourth Amendment claim, however, because the judgment did not distinguish between pretrial and trial events. The Court of Appeals

reasoned that in lieu of its holding, any damages flowing from trial events would be unrecoverable under the newly circumscribed Fourth Amendment claim. (Pet.App. 3a and 41-43a). Again, Castellano was not required to cross-appeal to be entitled to retry his case with this new limitation on recoverable damages because he was not seeking to expand his rights under the judgment or to alter the verdict, but to affirm it. *American Railway Express Co.*, 265 U.S. at 435, 44 S.Ct. at 560, 68 L.Ed. at 1087.

The Court of Appeals correctly held that Castellano also may re-plead state law claims. (Pet.App. 43-44a). The Court of Appeals reasoned that Castellano had purposely abandoned his state law claims because until now the elements of a state law malicious prosecution claim and a Fourth Amendment claim under Section 1983 had been "coextensive." (Pet.App.44a). The Court of Appeals conceded that it had "pulled the legal rug from all parties," warranting remand. (Pet.App. 44a).

The Cross-Petitioners rely extensively on Justice Barksdale's dissent.[2] With due respect to Justice Barksdale's version of events at oral argument,[3] the Cross-Petitioners offer no legal authority permitting this Court to *de novo* substitute its findings as to whether Castellano urged affirmation on due process grounds at oral argument for that

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[2] Justice Barksdale's dissent is premised on his erroneous contention that Castellano did not sufficiently urge affirmation of the judgment based on the submission of the due process claim in the jury charge. Justice Barksdale's dissent is silent as to why the exception would not apply to the Fourth Amendment or state-law claims.

[3] (Pet.App. 53-54a).

of the *en banc* majority of the Court of Appeals. The Court of Appeals, as stated above, did not create any new claims. (Pet.App.3a).

Justice Barksdale also argues with little explanation that "fairness must be shown to both sides,"and in his view, "it is quite unfair to defendants, especially in light of what repeatedly took place at trial concerning the Fourth Amendment claim, to afford Castellano yet another opportunity to try such a claim." (Pet.App. 68a). In his weighing of "fairness," Justice Barksdale apparently gives little weight to the fact that (1) a jury concluded the Cross-Petitioners fabricated evidence, perjured themselves, and maliciously conspired to frame Castellano for a felony crime that he did not commit; (2) the Cross-Petitioners repeatedly failed to object to the jury charge at trial; and (3) the Court of Appeals reversed 20-plus years of legal precedent, in pulling the "legal rug" from Castellano.

Even Justice Jones in her dissent acknowledged the "fairness" of remand on the due process claims, conceding:

> "at every step of litigation, [Castellano] conscientiously attempted to conform to this court's decisions and to accomplish the ultimately impossible task of harmonizing our case law with the Supreme Court. Because this court changed the game technically on Castellano, he should be allowed to retry this claim as one for violation of procedural due process based on appellant's fabrication of evidence against him."

(Pet.App. 46a).[4]

2. Review should be denied because whether a cross appeal is a rule of practice or a jurisdictional requirement was not an issue before the Court of Appeals, but regardless under the unique circumstances of this case, remand was appropriate

The Cross-Petitioner incorrectly asserts that this case calls into question this Court's longstanding rule that:

> "Absent a cross appeal, an appellee may 'urge in support of a decree any matter in the record, although his arguments may invoke an attack on the reasoning of the lower court,' but may not 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.'"

American Railway Express Co., 265 U.S. at 435, 44 S.Ct. at 560, 68 L.Ed. at 1087. The Circuit Court concluded that Castellano "did not attempt to expand his rights under the judgment by urging that it can be sustained under the Fourteenth Amendment despite the ruling of the trial court." (Pet.App. 43a).[5] Simply put, Castellano fell within the

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[4] Justice Jones joined Justice Barksdale's dissent on remand of the Fourth Amendment claims without further explanation.

[5] Justice Higgenbotham, who authored the majority opinion in *Castellano,* is most certainly familiar with the application of the rule articulated in *American Railway Express* Co. *See, Marte v. Hines,* 117 F.3d 1504 (5th Cir. 1997) (J. Garwood dissenting).

exception of the rule articulated in *American Railway Express,* and no cross-appeal was required. *See also, Langes v. Green,* 282 U.S. 531, 41 S.Ct. 243, 75 L.Ed. 520 (1931). As such, whether a cross-appeal is a "rule of practice" or a jurisdictional requirement that can be waived has not been shown to be at issue here.

The Cross-Petitioners are correct that the courts of appeals split over whether a cross appeal is a rule of practice or a jurisdiction requirement that may be waived under some circumstances. The Fifth Circuit Court of Appeals addressed this split of authority in detail in *Marte v. Hines,* 117 F.3d 1504 (5th Cir. 1997) (J. Garwood dissenting) (citing case).[6] The Second, Fourth, Ninth, and District of Columbia Circuits have recognized that the cross-appeal is a rule of practice that can be dispensed with in certain circumstances. *See, Texport Oil Co. v. M/V Amolyntos,* 11 F.3d 361, 366 (2nd Cir. 1993); *LaFaut v. Smith,* 834 F.2d 389, 394 n. 9 (4th Cir. 1987); *Bryan v. Technical Research Company,* 654 F.2d 1337, 1341-42 (9th Cir. 1981); *Spann v. Colonial Village, Inc.,* 899 F.2d 24, 32-33 (D.C. Cir.), *cert. denied,* 498 U.S. 980, 981, 111

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[6] Interestingly, Justices Barksdale, Jones, and Jolly, who argued here in dissent that a cross appeal was jurisdictional for some or all of Castellano's claims joined the majority in *Marte*, which held that the appellate court has the authority to *sua sponte* change the district court's judgment from one dismissing the claims without prejudice to one dismissing with prejudice even though there was no cross-appeal. *Id.* at 1506. For the record, Justice Higgenbotham, who wrote the majority opinion in *Castellano* dissented in *Marte*, arguing that a cross appeal is jurisdictional where the appellate court seeks to modify the judgment in such a manner in favor of a defendant. *Id.* at 1506 (J. Garwood, dissenting) (leaving open the question of whether under some circumstances the cross appeal requirement is waivable).

S.Ct.508, 509, 112 L.Ed.2d 521 (1990).

The First, Sixth, Seventh, Tenth, and District of Columbia Circuits have concluded that the cross appeal requirement is jurisdictional. *See, Johnson v. Teamsters Local 559,* 102 F.2d 21, 29 (1st Cir. 1996); *Francis v. Clark Equipment Co.,* 993 F.2d 545, 552-553 (6th Cir. 1993); *Rollins v. Metropolitan Life Ins. Co.,* 912 F.2d 911, 917 (7th Cir. 1990); *Savage v. Cache Valley Dairy Ass'n,* 737 F.2d 887, 888-889 (10th Cir. 1984); *Gomez v. Wilson,* 477 F.2d 411, 414 n. 10 (D.C.Cir. 1973).

The Fifth Circuit itself is divided as to whether a cross appeal is a jurisdictional requirement or a rule of practice that can be waived under certain circumstances. The dissent in *Marte* provides an extensive list of Fifth Circuit opinions on both sides of the issue. 117 F.3d at 1508-09. The Third and Eighth also split among themselves as to whether the requirement is jurisdictional or a rule of practice. *See, E.F. Operating Corp. v. American Buildings,* 993 F.2d 1046, 1049 & n. 1 (3rd Cir.), *cert. denied,* 510 U.S. 868, 114 S.Ct. 193, 126 L.Ed. 151 (1993) and *Benson v. Armontrout,* 767 F.2d 454, 455 (8th Cir. 1985) (cross appeal jurisdiction); *Compare, United States v. Tabor Court Realty Corp.,* 943 F.2d 335, 342-45 (3rd Cir. 1991) and *Hysell v. Iowa Public Service Co.,* 559 F.2d 468, 476 (8th Cir. 1977) (cross appeal non-jurisdictional).

Review should be denied because remand was appropriate under the "unique circumstances of this case" of this case and the significant disagreement among the various Courts of Appeals over whether a cross appeal is a rule of practice or

jurisdictional requirement that can be waived.[7] (Pet.App. 29-30a).

CONCLUSION

For the reason stated above, the Court should deny the Conditional Cross-Petition.

Respectfully Submitted,

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[7] The Court of Appeals applied the same reasoning to otherwise ignore the ordinary rules of appellate practice and apply an abuse of discretion standard rather than a plain error review to the jury charge despite the Cross-Petitioners' repeated failure to properly object at trial. (Pet.App. 29-30a).